

# Pregnant Persons as a Gender Category: A Trans Feminist Analysis of Pregnancy Discrimination

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## 1. THE PUZZLE: HOW IS PREGNANCY DISCRIMINATION BASED ON SEX?

The U.S. Supreme Court in *Geduldig v. Aiello* (1974): Discrimination on the basis of pregnancy is *not* discrimination on the basis of sex because pregnancy is unique to women as a gender.

“The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.” *Geduldig*, 417 U.S. at 497 n.20.

“There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” *Id.* at 496–97.

The prevailing feminist response: Discrimination on the basis of pregnancy is discrimination on the basis of sex *because* pregnancy is unique to women as a gender.

“To deprive a woman . . . of disability pay because she is pregnant discriminates on the basis of sex because pregnancy has a *direct* relation to sex, and produces immediate disadvantages for employment for women only—and that is the end of the argument.” (MacKinnon, *Sexual Harassment of Working Women*, p. 123, *her emphasis*)

Trouble for trans feminism: If pregnancy discrimination disadvantages not just pregnant women but also pregnant men and pregnant nonbinary persons—indeed, *all* pregnant persons—how can pregnancy discrimination be based on sex?

**My view:** Pregnancy discrimination is based on sex not because pregnancy is unique to women as a gender, but because pregnant persons constitute a gender category of their own.

## 2. DISCRIMINATION AS UNEQUAL SOCIAL MEANING

Geduldig’s account (the “differences” conception): Discrimination is differential treatment based on a certain trait (itself).

A statute, policy, practice, (in)action, norm, institution, or structure *P* discriminates against *Fs* in a *P*-relevant context *C* on the basis of a trait *T* iff<sub>df</sub> in *C*, *P* treats *Fs* differently from similarly situated non-*Fs* on the basis of *T*.

MacKinnon’s alternative (the “inequality” conception): Discrimination is systematic disadvantage based on the social meaning of the relevant trait.

A statute, policy, practice, (in)action, norm, institution, or structure *P* discriminates against *Fs* in a *P*-relevant context *C* on the basis of a trait *T* iff<sub>df</sub> in *C*, *Fs* are systematically (that is, non-accidentally) disadvantaged by the social meaning of *T*.

	<i>Differences conception</i>	<i>Inequality conception</i>
<i>Nature of discrimination</i>	Differential treatment	Disadvantageous treatment
<i>Legally relevant meaning of “sex”</i>	Sex as biological difference	Gender as social meaning of sex

### 3. APPLYING THE INEQUALITY CONCEPTION TO PREGNANCY DISCRIMINATION

One would expect, then, that pregnancy in the sense suitable for an inequality analysis of pregnancy discrimination should too be a *social* status and position.

The disadvantage—hence the injury—of pregnancy discrimination results not from the biological fact of pregnancy, but from pregnancy’s unequal social meaning.

Pregnancy’s unequal social meaning systematically disadvantages not just women, but anyone *taken, suspected, or expected* to be, to have been, or to become pregnant.

In employment, for example, an inequality analysis should find the injury of pregnancy discrimination not in the biological fact of pregnancy, but in “the model of the job” (MacKinnon, p. 271 n. 72), “the disability plan” (p. 121), and “the structure of the job market” (p. 118).

On my reading, MacKinnon’s own radical feminist theory of discrimination commits her to a trans feminist analysis of pregnancy discrimination *avant la lettre*. And yet, her explicit treatment of pregnancy discrimination fails to live up to that commitment.

### 4. PREGNANT PERSONS REDUX

What’s responsible for the *Geduldig* result, I think, is not just the differences conception of discrimination (*pace* MacKinnon), or even just the differences conception of discrimination joined by a cissexist conception of pregnancy as distinctively women’s. Rather, there is a third assumption:

*The binary conception of sex/gender:* To discriminate on the basis of sex just is to discriminate on the basis of *either* being a woman *or* being a man.

Even on MacKinnon’s account, pregnancy discrimination is based on sex only because pregnancy’s social meaning systematically disadvantages *pregnant persons qua women*.

**My proposal:** Pregnancy discrimination is based on sex because it bears on the social meaning of sex *directly* and *immediately*, not by way of womanhood.

*Gender categories:* A category is gendered if<sup>1</sup> its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the category is “marked” as a target for this treatment by observed or imagined bodily features presumed to be evidence of a certain biological role in reproduction.<sup>2</sup>

*The category of pregnant persons:* *S* is a pregnant person iff<sub>df</sub> *S* is systematically subordinated along some dimension (economic, political, legal, social, etc.), and *S* is “marked” as a target for this treatment by observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (presently, previously, or future) pregnant body.

Pregnancy can be gendered even if it is not gendered *woman* or even sexed *female*.

Sidesteps worries about ungendering pregnancy (cf. Barnes, MacKinnon, Ginsburg).

Does not run into worries about wrongful exclusion/marginalization/inclusion.

1. I’m opting only for a sufficient condition here so categories based instead on one’s authentic sense of self can be gender categories as well.

2. I view “biological role in reproduction” as falling short of the full meaning of “sex,” though it is sufficient for my purposes here.